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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

321 STUDIOS, also known as 321 Studio,  
LLC,

Plaintiff,

v.

METRO-GOLDWYN-MAYER STUDIOS  
INC.; TRISTAR PICTURES, INC.;  
COLUMBIA PICTURES INDUSTRIES,  
INC.; SONY PICTURES  
ENTERTAINMENT, INC.; TIME  
WARNER ENTERTAINMENT CO. L.P.;  
DISNEY ENTERPRISES, INC.;  
UNIVERSAL CITY STUDIOS, INC.; and  
THE SAUL ZAENTZ COMPANY,

Defendants.

METRO-GOLDWYN-MAYER STUDIOS  
INC.; TRISTAR PICTURES, INC.;  
COLUMBIA PICTURES INDUSTRIES,  
INC.; TIME WARNER ENTERTAINMENT  
COMPANY, L.P.; DISNEY ENTERPRISES,  
INC.; THE SAUL ZAENTZ COMPANY;  
and UNIVERSAL CITY STUDIOS LLLP,  
formerly known as UNIVERSAL CITY  
STUDIOS, INC.

Counterclaimants,

Case No.: C-02-1955 SI

**NOTICE OF MOTION AND MOTION  
OF DEFENDANTS AND  
COUNTERCLAIMANTS FOR PARTIAL  
SUMMARY JUDGMENT**

Date: Friday, February 28, 2003

Time: 9:00 a.m.

Courtroom: 10, 19th Floor

Judge: The Honorable Susan Illston

1 v.

2 321 STUDIOS, also known as 321 Studio,  
3 LLC.; ROBERT MOORE, an individual;  
4 ROBERT SEMAAN, an individual; and  
5 VICTOR MATTISON, an individual,

6 Counterclaim Defendants.

7 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

8  
9 **PLEASE TAKE NOTICE** that on February 28, 2003 at 9:00 a.m., or as soon thereafter  
10 as the matter may be heard before the Honorable Susan Illston, United States District Judge, in  
11 Courtroom 10 on the 19<sup>th</sup> Floor, 450 Golden Gate Avenue, San Francisco, California.  
12 Defendants and Counterclaimants Metro Goldwyn-Mayer Studios Inc., TriStar Pictures, Inc.,  
13 Columbia Pictures Industries, Inc., Sony Pictures Entertainment Inc., Time Warner  
14 Entertainment Co. L.P., Disney Enterprises, Inc., Universal City Studios LLLP, formerly known  
15 as Universal City Studios, Inc., and The Saul Zaentz Company ("the Studios") will and hereby  
16 do move for summary adjudication in favor of the Studios and against Plaintiff/Counterclaim  
17 Defendant 321 Studios ("321") on 321's First Claim (Declaratory Relief under the DMCA, 17  
18 U.S.C. Section 1201 *et seq.*), for summary adjudication that 321 is liable on the Studio's  
19 Counterclaim (violation of the DMCA, 17 U.S.C. § 1201), and for an order dismissing as moot  
20 321's Second Claim (Declaratory Relief, Direct, Vicarious or Contributory Infringement, [1]7  
21 U.S.C. Section 101 *et seq.*).  
22

23 The Studios seek an order adjudicating (1) that 321 is not entitled to a declaratory  
24 judgment that its products DVD Copy Plus and DVD-X Copy are legal under 17 U.S.C. § 1201  
25 and is not entitled to a declaratory judgment that the DMCA is invalid or unconstitutional, (2)  
26 that 321 is liable for violation of Section 17 U.S.C., and (3) dismissing 321's Second Claim for  
27 Relief as moot.  
28

1 This Motion is based on this Notice of Motion and Motion, the Memorandum of Points  
2 and Authorities and Declarations of Robert W. Schumann and Marc E. Mayer served and filed  
3 concurrently herewith, on the pleadings and records on file in this action, and on such other  
4 argument and evidence as may be presented to this Court at or before the hearing on this  
5 Motion.

6  
7 DATED: January 10, 2003

8 RUSSELL J. FRACKMAN  
9 PATRICIA H. BENSON  
10 STEVEN B. FABRIZIO  
MITCHELL SILBERBERG & KNUPP LLP

11 By: \_\_\_\_\_  
12 Russell J. Frackman  
13 Attorneys for Plaintiffs  
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**Introductory Statement**

The action filed by Plaintiff/Counterclaim Defendant 321 Studios, LLC. ("321") is the most recent in a series of unsuccessful challenges to the anti-circumvention provisions of the Digital Millennium Copyright Act ("DMCA"). The DMCA expressly and unambiguously prohibits trafficking in "any technology, or product...or part thereof," that primarily is designed to circumvent any access-control or other technological measures implemented by a copyright holder to protect its rights in its copyrighted works, including the exclusive right to copy. 17 U.S.C. §§1201(a) and 1201(b). In violation of the DMCA, 321 is trafficking in software designed *expressly* to circumvent the access-control and copy-prevention system incorporated into the DVDs containing copyrighted motion pictures that are commercially released by Defendants/Counterclaimants (the "Studios").

In its claim for declaratory relief, 321 concedes that the software it distributes is designed to permit the copying of the Studios' encrypted copyrighted motion pictures on DVDs. FAC ¶¶ 1, 23, 26, 28, 29. By that concession, 321 necessarily admits that its software is designed to circumvent the encryption protection embedded in those DVDs. Thus, *the* material fact necessary to decide both 321's challenge to section 1201 and the Studios' counterclaim for violation of section 1201 is undisputed. No discovery on this dispositive issue is necessary. Therefore, in the interests of economy and efficiency, the Studios move for summary adjudication of 321's First Claim for Declaratory Relief Under the DMCA and of the Studios' Counterclaim for violation of section 1201.

The legal issues involved – the validity and applicability of the DMCA – previously have been analyzed and decided in two cases. 321, which is based in Missouri, filed this declaratory relief action after the Second Circuit, affirming the District Court's judgment in a lawsuit brought by most of the same motion picture studios that are Defendants and Counterclaimants in this case, had flatly rejected, in a highly-publicized opinion, the precise arguments 321 advances here. Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001), aff'g, Universal City Studios, Inc. v. Reimerdes, 111 F. Supp.2d 294 (S.D.N.Y. 2000). Forum shopping in no way has improved 321's arguments, however. After this case was filed, a third court, in this district, also

1 rejected the same Constitutional challenges that 321 raises here. United States v. Elcom, Ltd.,  
 2 203 F. Supp.2d 1111 (N.D. Cal. 2002) (Whyte, J.)

3 If the Court determines that 321's products violate the anti-circumvention provisions of  
 4 the DMCA, then 321 must stop distributing those products (and will be liable for damages).  
 5 Therefore, there will not be any current, judicable controversy as to whether, by selling its  
 6 circumvention products, 321 also is liable for copyright infringement – which is the issue raised  
 7 in 321's Second Claim for Declaratory Relief – and that claim will be moot. Hal Roach Studios,  
 8 Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1555-56 (9<sup>th</sup> Cir. 1990) (request for  
 9 declaration of non-infringement presents an actual case or controversy "if the plaintiff has a real  
 10 and reasonable apprehension that he will be subject to liability [for infringement] if he continues  
 11 to manufacture his product"); Preiser v. Newkirk, 422 U.S. 395, 401 (1975) ("[A]n actual  
 12 controversy must be extant at all stages of review, not merely at the time the complaint is filed").  
 13 Accordingly, 321's Second Claim would be dismissed as moot. ATMI, Inc. v. Innovative  
 14 Engineering Solutions, Inc., 2002 WL 826794 at \*1 (N.D. Cal. 2002) (Illston, J.) (granting  
 15 plaintiff partial summary judgment on its claim for declaratory judgment that defendant did not  
 16 own certain patents, and dismissing as moot plaintiff's claim for declaratory judgment that it did  
 17 not infringe those patents).

## 18 **I. STATEMENT OF THE ISSUES**

19 1. Does the manufacture and trafficking in software that circumvents copying and  
 20 access control measures violate the "anti-circumvention" provisions of the DMCA?

21 2. Are the DMCA's anti-circumvention provisions unconstitutional?

## 23 **II. STATEMENT OF UNDISPUTED BACKGROUND FACTS**<sup>1</sup>

### 24 **A. The Studios and DVD Technology**

25 The Studios, directly or through affiliates, are engaged in the business of producing and  
 26 distributing motion pictures and other copyrighted works. FAC ¶5; AC ¶ 5. The Studios

27 \_\_\_\_\_  
 28 <sup>1</sup> The facts derived from 321's First Amended Complaint ("FAC") and Answer to  
 Counterclaim ("AC") are assumed to be true for purposes of this Motion only.



1 distribute motion pictures theatrically, by television transmission, and on portable media, such as  
 2 videocassette tapes and DVDs (an acronym for “Digital Versatile Discs”). FAC ¶ 5, 19;  
 3 Reimerdes, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000).

4 A DVD is a digital storage medium, similar in shape and size to the “compact disc”  
 5 (“CD”) medium that is used for the storage of audio files. FAC ¶ 19; Declaration of Robert W.  
 6 Schumann (“Schumann Decl.”), ¶ 7. Because a DVD is capable of storing several times the  
 7 amount of data that can be stored on a CD, DVDs are used to store the digital video and audio  
 8 information that comprises a full-length motion picture (or other audiovisual work). FAC 19;  
 9 Schumann Decl., ¶¶ 8-9; Reimerdes, 111 F. Supp. 2d at 307. DVDs can be viewed either on a  
 10 television equipped with a stand-alone DVD player or on a computer with a DVD-Rom and  
 11 specialized playback software (“DVD Player” software). FAC ¶ 20; Schumann Decl., ¶ 9.  
 12 DVDs are the latest technology for private home viewing of recorded motion pictures, and  
 13 provide a significant improvement on audio and visual quality as compared to video cassette  
 14 tapes. FAC ¶ 20; Reimerdes, 111 F. Supp. 2d at 307; Schumann Decl. ¶ 10.

15 B. “CSS” And DVD Anti-Piracy Technology

16 DVDs distributed by the Studios are protected by a technology known as “Content  
 17 Scramble System,” or “CSS.” The development of CSS was explained in Reimerdes:

18 “Motion pictures first were, and still are, distributed to the home  
 19 market in the form of video cassette tapes. In the early 1990’s,  
 20 however, the major movie studios began to explore distribution to  
 21 the home market in digital format, which offered substantially  
 22 higher audio and visual quality and greater longevity than video  
 23 cassette tapes. This technology, which in 1995 became what is  
 24 known as DVD, brought with it a new problem – increased risk of  
 25 piracy by virtue of the fact that digital files, unlike the material on  
 26 video cassettes, can be copied without degradation from  
 27 generation to generation. . . . Discussions among the studios with  
 28 the goal of organizing a unified response to the piracy threat  
 began in earnest in late 1995 or early 1996. . . . In 1996,  
 Matsushita Electric Industrial Co. and Toshiba Corp. presented –  
 and the studios adopted – CSS.” Reimerdes, 111 F. Supp. 2d at  
 309.

See also Schumann Decl., ¶ 11-12.

1 CSS is an integrated system of access "locks," encryption technology and licensing  
 2 provisions that protect the contents of a DVD from unauthorized access and copying.  
 3 Reimerdes, 111 F. Supp. 2d at 309-10; Schumann Decl., ¶ 14. 321 accurately summarizes the  
 4 encryption elements of CSS:

5 "Most DVDs manufactured, distributed or sold by the [Studios] are  
 6 recorded onto the DVD in a scrambled format in which the data is  
 7 encrypted in order to prevent unauthorized access to the data  
 8 contained on the DVD. . . . [The Studios] have adopted CSS as a  
 9 standard encryption technique to prevent access to DVD data. CSS  
 10 works by scrambling the digital data that makes up each frame of  
 11 video images. The CSS standard, as well as the licensing of the  
 12 electronic encryption 'keys' necessary to play back the DVDs, is  
 13 administered by an organization known as the Copyright Control  
 Authority (CCA). The CSS 'keys' are licensed to the makers of  
 DVD players and DVD software. A CSS-protected DVD can only  
 be played back or viewed by DVD players or computer software  
 which contain the 'keys' licensed by the CCA, either directly or  
 through subcontracts. When the CSS-encrypted DVD is placed in  
 a licensed DVD player, the DVD player uses software and  
 electronic decryption 'keys' in order to unscramble the data and  
 display the frames that make up the video images." FAC ¶23.

14 CSS also has a "locking" mechanism so that the computer's DVD drive will not allow  
 15 access to a DVD's content until it confirms that the DVD player software seeking access is an  
 16 authentic, CCA-licensed player. Schumann Decl. ¶ 15. The CSS locking mechanism and  
 17 encryption are independent and complementary protections. Id., ¶ 14, 16. Only players and  
 18 drives equipped with both the proper authentication credentials and the necessary "keys" are able  
 19 to access and decrypt CSS-encrypted DVD files and thereby play the motion pictures stored on  
 20 DVDs. Id., ¶¶ 16-20. In order to ensure that CSS decryption technology (1) would not become  
 21 generally available, and (2) would only be used to play – and not to copy – DVDs, CCA licenses  
 22 CSS subject to strict requirements, including that authorized DVD players not permit copying.  
 23 Id., ¶ 14; Reimerdes, 111 F.Supp. 2d at 310. As a result of CSS and the CCA licensing  
 24 procedures, DVDs encrypted with CSS cannot be accessed (played) on noncompliant players and  
 25 cannot be digitally copied (including on a personal computer) unless CSS protection is  
 26 circumvented. Id. ¶ 21.

1 C. The DMCA Anti-Circumvention Provisions

2 Congress enacted the DMCA in 1998. (It is codified in the Copyright Act at 17 U.S.C.  
3 §§1201 et seq.). A key element of the digital protection enacted as part of the DMCA was to  
4 “provide ‘legal protection and effective legal remedies’ against circumventing technological  
5 measures, e.g., encryption and password protection, that are used by copyright owners to protect  
6 their works from piracy . . . .” S. Rep. No. 105-190, at 10 (1998); see also Corley, 273 F.3d at  
7 440. Congress considered this protection to be critical so that copyrighted works could be  
8 offered to the public in digital formats without the substantial risk of wholesale, high-tech  
9 infringement:

10 “When copyrighted material is adequately protected in the digital  
11 environment, a plethora of works will be distributed and  
12 performed.... In order to protect the owner, copyrighted works  
13 will most likely be encrypted and made available to consumers  
14 once payment is made for access to a copy of the work. There will  
be those who will try to profit from the works of others by  
decoding the encrypted codes protecting copyrighted works, or  
engaging in the business of providing devices or services to enable  
others to do so.” H. Rep. No. 105-511(I), p. 10 (1998).

15 See also 3 M. & D. Nimmer, Nimmer On Copyright § 12A.03 at 12A-14 (2001) (hereafter  
16 “Nimmer”) (section 1201 is “first not only in order and length [of the DMCA sections], but in  
17 importance as well.”)

18 The approach Congress adopted was to “import[] into the online environment the same  
19 sensitivities that Congress previously brought to bear ‘in the areas of cable television and  
20 satellite transmissions to prevent unauthorized interception and descrambling of signals.’” 3  
21 Nimmer, § 12A.03, at 12A-14, quoting H. Rep. No. 105-511(I), at 10.

22 “The Copyright Act in section 1002(c) already protects sound  
23 recordings and musical works by prohibiting devices which  
24 circumvent any program or circuit that implements a serial copy  
25 management system or similar system included in digital audio  
26 recording devices and digital audio interface devices. The  
Communications Act in section 605(e)(4) prohibits devices that are  
‘primarily of assistance in the unauthorized decryption of satellite  
cable programming.’” S. Rep. No. 105-190 at 11.

27 Two key provisions of the DMCA prohibit trafficking in technology that circumvents  
28 copyright protection systems such as CSS. Corley, 273 F.3d at 440. First, 17 U.S.C.

§ 1201(a)(2) prohibits the “manufactur[ing], import[ing], offer[ing] to the public, provid[ing], or otherwise traffic[king]” in technology or products designed to circumvent a technological measure that controls *access* to a copyrighted work. Second, 17 U.S.C. 1201(b) prohibits trafficking in technology or products designed to circumvent “a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof” – e.g., *the reproduction right*. S. Rep. No. 105-190 at 12 (“Section 1201(b) is designed to protect the traditional copyright rights of the copyright owner”). As the Second Circuit explained:

“[A]lthough both subsections prohibit trafficking in a circumvention technology, the focus of subsection 1201(a)(2) is circumvention of technologies designed to *prevent access* to a work, and the focus of subsection 1201(b)(1) is circumvention of technologies designed to *permit access* to a work but *prevent copying* of the work or some other act that infringes a copyright.” *Corley*, 273 F.3d at 441 (emphasis in original) (citing S. Rep. No. 105-190, at 11-12).

#### D. “DeCSS” and the *Corley* Litigation

Around 1999, a software utility known as “DeCSS” appeared on the Internet. (Presumably, the first syllable refers to the program’s ability to “de-scramble” or “de-crypt” CSS). Schumann Decl., ¶ 22. “If a user runs the DeCSS program . . . with a DVD in the computer’s disk drive, DeCSS will decrypt the DVD’s CSS protection, allowing the user to copy the DVD’s files and place the copy on the user’s hard drive. The result is a very large computer file that can be played on a non-CSS-compliant player and copied, manipulated, and transferred just like any other computer file.” *Corley*, 273 F.3d at 437-38; Schumann Decl., ¶¶ 23-24. See also FAC ¶25 (DeCSS is a “piece of software which descrambles DVD data encrypted by CSS, permitting the access and playback of legitimately owned DVD videos on computers not equipped with the CSS encryption keys”). The quality of the resulting decrypted movie is “virtually identical” to that of the encrypted movie on the original DVD. *Corley*, 273 F.3d at 438; Schumann Decl. ¶ 23.

In January 2000, eight plaintiffs, including some of the Studios, sued a distributor of DeCSS. *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000). The District Court issued a preliminary injunction, enjoining the distribution of DeCSS. *Id.* In a later

opinion, the District Court held that by distributing DeCSS, the Defendants violated the DMCA's anti-circumvention provisions, noting that "[t]here is no serious question that defendants' posting of DeCSS violates the DMCA." Reimerdes, 111 F. Supp. 2d 294, 304 (S.D.N.Y. 2000). The Court determined that "DeCSS is a free, effective and fast means of decrypting plaintiffs' DVDs," and that "the availability of DeCSS on the Internet effectively has compromised plaintiffs' system of copyright protection for DVDs." 111 F. Supp. 2d at 315. The Second Circuit Court of Appeals affirmed, holding that "DeCSS is computer code that can decrypt CSS. In its basic function, it is like a skeleton key that can open a locked door, a combination that can open a safe, or a device that can neutralize the security device attached to a store's products." Corley, 273 F.3d at 452-53.

#### E. 321 and The DVD Circumvention Software

Beginning around August 2001 – after the well-publicized injunction had been issued in Reimerdes prohibiting the distribution of DeCSS – 321 not only ignored the clear ruling that distributing a CSS circumvention utility was illegal, but took the concept of DeCSS one step further by marketing and selling DVD Copy Plus, a software application that bundles a program that operates in a manner largely identical to DeCSS with other software that then copies the "de-scrambled" DVD content onto a CD. FAC ¶¶ 26, 29; Schumann Decl. ¶¶ 26-30. In November 2002, 321 began selling a second software product called DVD-X-Copy, which copies the "de-scrambled" DVD content onto a DVD, rather than a CD. FAC ¶ 28; Schumann Decl. ¶ 31. ("DVD Copy Plus" and "DVD-X-Copy" collectively are referred to as the "DVD Circumvention Software").

The processes by which 321's DVD circumvention software operates are described in detail in the Schumann Declaration. Schumann Decl. ¶¶ 25-37. In its basic function, the DVD Circumvention Software "rips" (copies) a DVD's CSS-protected content onto a computer hard drive in a de-scrambled form, and then copies (or "burns") that de-scrambled DVD content onto computer disc. FAC ¶¶ 26, 28. DVD Copy Plus "compresses" the de-scrambled DVD content on the computer hard drive to a smaller size, and then copies the de-scrambled, compressed

1 content onto a recordable CD. FAC ¶ 26. DVD-X-Copy copies the de-scrambled DVD content  
2 from the hard drive to a recordable DVD, without first compressing the file. FAC ¶ 28.

3 DVD Copy Plus and DVD-X-Copy achieve precisely the same end result as DeCSS, and  
4 in order to do so necessarily circumvent CSS. Schumann Decl. ¶¶ 6, 25-36. Both products  
5 bypass CSS protection by improperly gaining access to the DVD content, causing its decryption,  
6 and depositing a de-scrambled, unprotected copy of the DVD content on the hard drive of the  
7 user's computer. Id. That post-circumvention copy is forever stripped of its CSS protection, and  
8 can be freely viewed (accessed) through unlicensed players, copied (as many times as a user  
9 wishes) or Internet distributed in its unprotected form. Id.

10 The DVD Circumvention Software currently is being marketed, distributed and sold by  
11 321 at retail stores and by mail-order through 321's Internet websites. FAC ¶ 26. Both DVD  
12 Copy Plus and DVD-X-Copy are sold by 321 with instructions and tutorials which explain, step-  
13 by-step, how to use the products to circumvent CSS protection. 321 also provides both live and  
14 Internet technical support for these products, through which purchasers may obtain assistance in  
15 installing and running the DVD Circumvention Software. The instructions for DVD Copy Plus  
16 specifically teach the user how to use the software to “*decode*, store, and rerecord video content  
17 that has been placed on a DVD.” FAC ¶ 29. 321 Studio's DVD Circumvention Software is  
18 marketed as a fast, easy way to copy CSS-protected DVDs. Declaration of Marc E. Mayer  
19 (“Mayer Decl.”), Exs. A, B. Advertising on 321's website promises that DVD-X-Copy will  
20 make “PERFECT COPIES OF YOUR DVDS!...IN ABOUT AN HOUR.” Id., Ex. C.

21 F. 321's Admissions That Its Software Circumvents CSS Technology

22 321 admits that the DVD Copy Plus is designed to circumvent CSS, and that it is either  
23 based on, derived from, or has the same effect as the DeCSS technology that the Corley and  
24 Reimerdes Courts found to have “compromised [the Studios'] system of copyright protection for  
25 DVDs.” Its First Amended Complaint alleges that DVD Copy Plus contains “four freely-  
26 available software components” (including a next generation DeCSS program, Schumann Decl.  
27 ¶ 28), and that its value “lies primarily in the instructions which permit the use of the software”  
28 to “*decode*, store, and rerecord video content that has been placed on a DVD.” FAC ¶ 29. 321



1 confirmed this in a press release: "DVD Copy Plus combines three freeware utilities for  
 2 **decoding**, storing and burning the DVD contents with interactive tutorial software developed by  
 3 321Studios.com to simplify those highly technical applications for use by anyone with a general  
 4 knowledge of Windows." Mayer Decl., Ex. C (emphasis added).

5 321 likewise admits that DVD-X-Copy operates to the same result as DeCSS by  
 6 decoding and descrambling the DVD's CSS-protected contents. As one of the programmers of  
 7 DVD-X-Copy explained:

8 "The dispute between whether or not DVD XCopy uses deCSS is  
 9 more an issue of semantics than substance. When Robert [Moore,  
 10 the President of 321] says we don't use DeCSS he is referring to the  
 11 source code for DeCSS, about which there was such a flap a year  
 or so ago. Bottom line is, yes, the software has to descramble the  
 contents of the DVD in order to do anything useful with it." Mayer  
 Decl., Ex. E.

12 321's chief executive, Robert Semaan, recently acknowledged that the software is no  
 13 different from preexisting CSS-decoding utilities: "People are already making DVD copies,  
 14 we're just making it simpler with a click of a button... It's not so earth-shattering from the  
 15 technology environment because that stuff already exists. What we're doing is bringing it to the  
 16 mass market." Mayer Decl., Ex. D.

#### 17 G. The Current Litigation

18 321's Complaint "asks the Court to confirm its right to distribute and sell DVD Copy Plus  
 19 and DVD-X COPY, [and] seek[s] a declaratory judgment that 321 Studios is not violating the  
 20 provisions of the Digital Millennium Copyright Act ("DMCA"), that it is not contributorily  
 21 infringing any copyright in video works stored in the DVD format, and that its activities are  
 22 protected by the First Amendment." FAC ¶ 2. On November 5, 2002, 321 filed a First Amended  
 23 Complaint, again asserting two claims for relief: First, without explaining the specifics of its  
 24 position, it seeks a declaratory judgment that 321's "activities in distributing DVD Copy Plus and  
 25 DVD-X-COPY do not violate the provisions of the DMCA or, in the alternative, that these  
 26 provisions are invalid in light of other copyright law provisions, these provisions are invalid  
 27 because Congress exceeded its enumerated powers under Article 1, Section 8, of the United  
 28 States Constitution, these provisions are unconstitutionally vague, and/or these provisions violate

the First Amendment of the Constitution.” FAC ¶ 44. Second, it seeks a declaratory judgment that, by virtue of its sale and distribution of DVD Circumvention Software, it is not liable for copyright infringement. FAC ¶ 49. On December 19, 2002, the Studios filed an Answer to the First Amended Complaint and a Counterclaim against 321, asserting violations of section 1201 of the DMCA.

#### H. The Elcom Litigation

Less than a month after 321 filed this action, another court in this district addressed many of the assertions 321 makes here. In United States v. Elcom, Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (Whyte, J.), the United States brought a criminal indictment, under section 1201, against the manufacturer, distributor, and creator of a software program (“AEBPR”) that allowed a user to remove use restrictions from encoded electronic books (“eBooks”) formatted for use only on a particular software application, the Adobe eBook Reader. Use of AEBPR, precisely like the DVD Circumvention Software, causes “the restrictions imposed by the publisher [to be] stripped away, leaving the eBook in a ‘naked PDF’ format that is readily copyable, printable, and easily distributed electronically.” 203 F. Supp. at 1118. Like 321 in this case, Defendant Elcom argued that the DMCA anti-circumvention provisions are unconstitutionally vague, exceed Congress’ enumerated powers, and violate its First Amendment rights. The Court considered and rejected each of these assertions. Id.<sup>2</sup>

### III. THE LEGAL STANDARD

A party seeking summary judgment has the initial burden of “informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S.

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<sup>2</sup> In December 2002, the jury acquitted Elcom of criminal violation of section 1201. The jury found that although Elcom's product was unlawful, it did not intend to violate the law. That verdict has no bearing here, because criminal intent is not an element of civil liability under the DMCA; even completely innocent violations (which is not the case here) are subject to civil liability. 17 U.S.C. § 1203(c)(5).



317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). There are no disputed issues of material fact relevant to DMCA liability. The undisputed facts establish, as a matter of law that 321 is liable under the DMCA.

#### IV. 321 IS LIABLE UNDER THE ANTI-CIRCUMVENTION PROVISIONS OF THE DMCA

Section 1201(a)(2) of the DMCA provides:

“[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that:

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title. 17 U.S.C. § 1201(a)(2)

These “access protection” anti-circumvention provisions prohibit the electronic “equivalent [of] breaking into a castle.” 3 Nimmer, § 12A.03[D][1], at 12A-33; H.R. Rep. No. 105-551(I), at 17 (1998) (“The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book”).

Section 1201(b)(1) provides:

“[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that:

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or portion thereof." 17 U.S.C. §1201(b)(1).

Only one of the three enumerated conditions ("primarily designed or produced for the purpose of circumventing", "limited commercially significant purpose or use other than to circumvent," or "marketed ...for use in circumventing") in sections 1201(a)(2) or 1201(b)(1) need be satisfied in order to find a violation. See S. Rep. No. 105-190, at 29 ("For a technology, product, service, device, component, or part thereof to be prohibited under this subsection, *one of three* conditions must be met.") (emphasis added).

A. 321 Is Engaged In Conduct Prohibited By Sections 1201(a)(2) and 1201(b)

The manufacture and distribution of the DVD Circumvention Software violates both sections 1201(a)(2) and 1201(b)(1) of the DMCA.

**First**, the DVD Circumvention Software plainly is "technology" within the meaning of section 1201. See Reimerdes, 111 F. Supp.2d at 317 ("[A] computer program...unquestionably is 'technology' within the meaning of the statute.").

**Second**, CSS is a "technological measure" that both (1) "effectively controls access to a work protected under this title" and (2) "effectively protects a right of a copyright owner under this Title." "[A] technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or treatment, with the authority of the copyright owner, to gain access to the work." 17 U.S.C. §1201(a)(3)(B). Congress made clear that technological measures based on encryption or scrambling "effectively control" access to copyrighted works. Reimerdes, 111 F. Supp. 2d at 318, citing H.R. Rep. No. 105-551(II) at 39 (1998). CSS prevents access to (i.e., use of) DVDs without the application of the proper CSS keys, so that a DVD cannot be played by any software

1 or hardware other than a licensed DVD player. Reimerdes, 111 F. Supp. 2d at 317-18 (“One  
 2 cannot gain access to a CSS-protected work on a DVD without application of the three keys that  
 3 are required by the software. One cannot lawfully gain access to the keys except by entering into  
 4 a license with the DVD CCA under authority granted by the copyright owners or by purchasing a  
 5 DVD player or drive containing the keys pursuant to such a license.”). See RealNetworks, Inc.  
 6 v. Streambox, Inc., Case No. 2:99-CV-02070, 2000 WL 127311, \*7 (W.D. Wash., Jan. 18, 2000)  
 7 (software technology that limited access to and playback of digital media files in proprietary  
 8 “RealMedia” format to plaintiff’s own media players was a technological measure that  
 9 “effectively controls access”).

10 CSS also “effectively protects a right of a copyright owner under this title” because it “in  
 11 the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right  
 12 of a copyright owner under this title.” 17 U.S.C. § 1201(b)(2)(B). CSS prevents, among other  
 13 things, the unauthorized *copying* of a DVD – a right reserved to the copyright owner. 17 U.S.C.  
 14 §106(1); see RealNetworks, at \*7 (software technology that prevented plaintiff’s media player  
 15 from allowing users to copy digital media files designated as copy-protected effectively protects  
 16 the right of a copyright owner to control the unauthorized copying of its work because it “may  
 17 restrict others from exercising a copyright holder’s exclusive right to copy its work.”).

18 **Third**, the DVD Circumvention Software – and particularly the “part thereof” that  
 19 accesses the DVD content and decrypts CSS while “ripping” the DVD – is (1) “primarily  
 20 designed or produced for the purpose of circumventing” CSS, (2) “has only limited  
 21 commercially significant purpose or use other than to circumvent” CSS, and (3) is marketed by  
 22 321 for use in circumventing CSS. Sections 1201(a)(3) and 1201(b)(2) define “circumvention”  
 23 as “avoiding, bypassing, removing, deactivating, or otherwise impairing a technological  
 24 measure.” The *only* purpose of the DVD Circumvention Software is to “avoid, bypass, remove,  
 25 or deactivate” CSS protection and thereby to permit access to and copying of CSS-protected  
 26 DVDs. See Reimerdes, 111 F. Supp. 2d at 319 (DeCSS software violated both 1201(a)(2) and  
 27 1201(b)); RealNetworks, at \*7-8 (“StreamBox VCR” software that improperly accessed  
 28 restricted “RealMedia” files by emulating plaintiff’s media player and then allowed such files to

be copied “bypassed” the access control technology and “circumvented” the copy protection technology); Sony Computer Entertainment America Inc. v. GameMasters, 87 F. Supp.2d 976, 987 (N.D. Cal. 1999) (“GameEnhancer” circumvented access control technology that permitted video game consoles to play only video games “when encrypted data is read from an authorized CD-Rom.”). Further, because DVDs *cannot be digitally copied without circumventing CSS*, the DVD Circumvention Software would not have any commercially significant purpose without its circumvention components. See RealNetworks, at \*8 (no commercial purpose other than circumvention). Finally, the DVD Circumvention Software is marketed as a tool to copy CSS-protected DVDs. That the DVD Circumvention Software may contain elements or applications that perform functions other than circumvention (such as compressing or burning the protection-circumvented works) is not relevant, because 321's distribution of the circumvention elements alone subjects it to liability. See 17 U.S.C. §§ 1201(a)(2) and 1201(b) (“[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, *or part thereof*...”). See also RealNetworks, at \*7 (“*[A]t least a part of the Streambox VCR. . . . circumvents the Copy Switch, enabling a user to make a copy of a file that the copyright owner has sought to protect*”).

B. None of the Exemptions Of Section 1201 is Applicable Here.

Section 1201 contains limited, specified exemptions for what otherwise would constitute unlawful trafficking in circumvention technology. None of these is applicable here. See 17 U.S.C. §§ 1201(e) (law enforcement, intelligence and other governmental activities), 1201(f)(3) (information acquired through reverse engineering “solely for the purpose” of achieving interoperability of computer programs as defined in the statute)<sup>3</sup>, 1201(g)(4) (providing technological means of circumvention to another with whom one is working collaboratively in good faith encryption research), and 1201(j)(4) (certain acts of security testing).

<sup>3</sup> Section 1201(f)(3) “does not apply to public dissemination of the means of circumvention, as the legislative history confirms.” Reimerdes, 111 F. Supp. 2d at 320.

C. "Downstream" Uses of Unlawfully-Circumvented DVD Content Are Irrelevant to Section 1201 Liability

With no defense to its liability under the DMCA, 321 attempts to cloud the issue with arguments that "post-circumvention" uses made of the decrypted DVDs allegedly are lawful. See, e.g., FAC ¶¶ 32-34. 321 is wrong that such uses are lawful. However, these arguments are irrelevant to 321's liability. Section 1201 prohibits the very acts of *circumventing access controls and trafficking in circumvention technology*, both of which necessarily occur before the end user burns, distributes, or otherwise undertakes any action with respect to the unprotected DVD. For that reason, any argument by 321 that copying of CSS-protected DVDs by end users of its DVD Circumvention Software is "fair use," is a red herring. Fair use, 17 U.S.C. §107, is a defense *only* to actions for *copyright infringement*, and not to liability under *section 1201*. See Elcom, 203 F.Supp.2d at 1124 ("Nothing within the express language would permit trafficking in devices designed to bypass use restrictions in order to enable a fair use, as opposed to an infringing use. The statute does not distinguish between devices based on the uses to which the device will be put. Instead, all tools that enable circumvention of use restrictions are banned, not merely those use restrictions that prohibit infringement."); Reimerdes, 111 F.Supp.2d. at 322 ("If Congress had meant the fair use defense to apply to such actions, it would have said so. Indeed, as the legislative history demonstrates, the decision not to make fair use a defense to a claim under Section 1201(a) was quite deliberate."); Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule (hereinafter, the "DMCA Rulemaking"), 37 CFR Part 201, 65 Fed. Reg. 64556-01, at 64561 ("fair use ...is not a defense to the cause of action created by the anticircumvention prohibition of section 1201"); 2 I. Ballon, E-Commerce and Internet Law §22.02[4][D][ii], at 22-16 ("Section 1201...is not limited by the fair use doctrine...").

V. **THE ANTI-CIRCUMVENTION PROVISIONS OF THE DMCA ARE NOT INVALID OR UNCONSTITUTIONAL**

Each constitutional argument raised in the FAC is without merit and previously has been rejected. This result is not surprising. "Legislation prohibiting circumvention devices is not

unprecedented." S. Rep. 105-190, at 11-12 (noting that §1002(c) of the Copyright Act, §605(e)(4) of the Communications Act, and article 1707(b) of the NAFTA all involve prohibitions on circumvention devices). "Similar laws have been enacted in related contexts." Id. at 28 (noting the 47 U.S.C. § 553(a)(2) prohibition on the manufacture or distribution of equipment intended for the unauthorized reception of cable television service). Section 1201 protects against trafficking in what essentially amounts to high-tech lock-picks. Id. at 11 (describing the anti-circumvention provisions as "roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses."); Corley, 273 F.3d at 452 ("[W]e must recognize that the essential purpose of encryption code is to prevent unauthorized access. Owners of all property rights are entitled to prohibit access to their property by unauthorized persons. Homeowners can install locks on the doors of their houses. Custodians of valuables can place them in safes. Stores can attach to products security devices that will activate alarms if the products are taken away without purchase.").

A. Congress Did Not Exceed Its Constitutional Power in Enacting the DMCA

321 suggests that the DMCA is invalid because Congress "exceeded its enumerated powers under Article I, Section 8, of the United States Constitution." FAC ¶44. This suggestion is without merit: The Commerce Clause, Article I, Section 8, Clause 3, "grants Congress the power to regulate commerce with foreign nations, among the several States and with the Indian tribes," (H. Rep. No. 105-551 (II), at 35 (1998)), and "Congress plainly has the power to enact the DMCA under the Commerce Clause." Elcom, 203 F.Supp.2d at 1138.<sup>4</sup> The Commerce Clause power, "like all others vested in Congress, is complete in itself, may be exercised to its

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<sup>4</sup> In Elcom, the Court also rejected the argument that Congress exceeded its authority under the Intellectual Property Clause, Art. 1, § 8, Cl. 8, when it enacted the DMCA. The Court reasoned that, if a statute is within Congress' Commerce power and is "not fundamentally inconsistent with" the Intellectual Property Clause, it is not an unconstitutional exercise of congressional power. 203 F. Supp. 2d at 1139-41. The Court concluded that the DMCA's anti-circumvention provisions were *not* "fundamentally inconsistent" with the Intellectual Property Clause, and that "preventing trafficking in tools that would enable widespread piracy and unlawful infringement is *consistent* with the Intellectual Property Clause's grant to Congress of the power to 'promote the useful arts and sciences' by granting exclusive rights to authors in their writings." Id. at 1140 (emphasis added).



utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”  
U.S. v. Lopez, 514 U.S. 549, 553 (1995) (quoting Gibbons v. Ogden, 9 Wheat 1, 196, 6 L. Ed. 23  
 (1824)). Under the Commerce Clause, Congress can, inter alia, regulate intrastate activities that  
 substantially affect interstate commerce. Id., at 558-59. The applicable test is “whether a  
 rational basis existed for concluding that a regulated activity sufficiently affected interstate  
 commerce.” Id. at 557. Such a basis clearly exists here.

In United States v. Moghadam, 175 F.3d 1269, 1280 (11<sup>th</sup> Cir. 1999), a defendant  
 charged with violating the “anti-bootlegging” statute (18 U.S.C. § 2319A), which, among other  
 things, criminalizes the unauthorized recording of live musical performances, challenged  
 Congress’ power to enact the legislation. Id. at 1271. The Court examined whether the  
 Commerce Clause provided Congressional power for the enactment, and concluded that the  
 required nexus with commerce easily was established:

“The link between bootleg compact discs and interstate commerce  
 and commerce with foreign nations is self-evident. . . . Bootleggers  
 depress the legitimate markets because demand is satisfied through  
 unauthorized channels. Generally speaking, performing artists  
 who attract bootleggers are those who are sufficiently popular that  
 their appeal crosses state or national lines. The very reason  
 Congress prohibited this conduct is because of the deleterious  
 economic effect on the recording industry. The specific context in  
 which [the anti-bootlegging statute] was enacted involved a treaty  
 with foreign nations, called for by the World Trade Organization,  
 whose purpose was to ensure uniform recognition and treatment of  
 intellectual property in international commerce. The context  
 reveals that the focus of Congress was on interstate and  
 international commerce. . . . Moreover, the type of conduct that  
 Congress intended to regulate by passing the anti-bootlegging  
 statute is by its very nature economic activity.” Id. at 1276-77.

The conduct regulated by the DMCA has a near-identical nexus with commerce, and one  
 that is more than sufficient to validate Congressional power for the enactment. The Court in  
Elcom specifically considered this issue:

“The DMCA prohibits conduct that has a substantial effect on  
 commerce between the states and commerce with foreign nations.  
 Trafficking in or the marketing of circumvention devices ‘for gain,’  
 as proscribed by [Section 1201] has a direct effect on interstate  
 commerce. To the extent that circumvention devices enable  
 wrongdoers to engage in on-line piracy by unlawfully copying and

1 distributing copyrighted works of authorship, the sale of such  
 2 devices has a direct effect on suppressing the market for legitimate  
 3 copies of the works. Accordingly, there is a rational basis for  
 4 concluding that the regulated activity sufficiently affects interstate  
 commerce to establish that Congress had authority under the  
 Commerce Clause to enact the legislation." Elcom, 203 F.Supp.2d  
 at 1138.

5 The DMCA legislative history reflects that it was developed out of "a wide-ranging  
 6 review of all issues" relating to electronic commerce (which Congress felt was "having a  
 7 profound impact on the nation's economy"), and a concern about products with the potential to  
 8 harm the developing market for digital content. H. Rep. No. 105-551 (II), at 22. Although "the  
 9 constitutionality of action taken by Congress does not depend on recitals of the power which it  
 10 undertakes to exercise," Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948), legislative  
 11 findings "are normally helpful to a court in finding an interstate commerce nexus." Moghadam,  
 12 175 F.3d at 1275 (citing Cheffer v. Reno, 55 F.3d 1517, 1520 (11<sup>th</sup> Cir. 1995)). Such findings  
 13 are entitled to "substantial deference." Turner Broad. Sys., Inc., v. FCC, 520 U.S. 180, 195  
 14 (1997); Moghadam, 175 F.3d at 1275 (citing United States v. Viscome, 144 F.3d 1365, 1371  
 15 (11<sup>th</sup> Cir. 1998)). Faced with the ease by which widespread Internet access could facilitate the  
 16 unlawful copying and distribution of digital media in orders of magnitude previously unseen,  
 17 Congress chose to regulate this aspect of electronic commerce by enacting the DMCA and,  
 18 specifically, section 1201. See S. Rep. No. 105-190, at 8 ("Due to the ease with which digital  
 19 works can be copied and distributed worldwide virtually instantaneously, copyright owners will  
 20 hesitate to make their works readily available on the Internet without reasonable assurance that  
 21 they will be protected against massive piracy."). Because a "rational basis" exists "for  
 22 concluding that a regulated activity sufficiently affected interstate commerce," Lopez, 514 U.S.  
 23 at 557, Congress properly exercised its power under the Commerce Clause. Moghadam, 175  
 24 F.3d at 1275.

#### 25 B. The DMCA Does Not Conflict With Or Otherwise Eliminate Fair Use

26 Like other defendants who unsuccessfully have challenged the DMCA, 321 likely will  
 27 argue that "fair use" is a constitutional mandate that the DMCA unconstitutionally "eliminates."  
 28 Both prongs of this argument are wrong. Fair use is not constitutionally-based.



1 “Asserting that fair use ‘is rooted in and required by both the  
2 Copyright Clause and the First Amendment...the Appellants  
3 contend that the DMCA, as applied by the District Court,  
4 unconstitutionally eliminates ‘fair use’ of copyrighted materials.  
We reject this extravagant claim....[T]he Supreme Court has never  
held that fair use is constitutionally required.” Corley, 273 F.3d at  
458.

5 Nor does the DMCA “eliminate” fair use; to the contrary, Section 1201(c)(1) expressly provides  
6 that “[n]othing in this section shall affect . . . defenses to copyright infringement, including fair  
7 use.” While the fair use doctrine may insulate certain limited uses of a copyrighted work from  
8 liability for copyright infringement, it never has been held to guarantee either access to a  
9 copyrighted work or copying of that work by the user’s “preferred technique.”

10 “We know of no authority for the proposition that fair use, as  
11 protected by the Copyright Act, much less the Constitution,  
12 guarantees copying by the optimum method or in the identical  
13 format of the original. . . . Fair use has never been held to be a  
14 guarantee of access to copyrighted material in order to copy it by  
the fair user’s preferred technique or in the format of the original.  
The fact that the resulting copy will not be as perfect or as  
manipulable as a digital copy obtained by having direct access to  
the DVD movie in its digital form, provides no basis for a claim of  
unconstitutional limitation of fair use.” Corley, 273 F.3d at 459.

15  
16 See also Elcom, 203 F.Supp.2d at 1125. (“Congress’ expressed intent to preserve the right of fair  
17 use is not inconsistent with a ban on trafficking in circumvention technologies, even those that  
18 could be used for fair use purposes rather than infringement. Fair use of a copyrighted work  
19 continues to be permitted . . . even though engaging in certain fair uses of digital works may be  
20 made more difficult if tools to circumvent use restrictions cannot be readily obtained.”); DMCA  
21 Rulemaking at 64569 (“there is no unqualified right to access works on any particular machine  
22 or device of the user’s choosing.”).

23 Congress even enacted an additional “fail-safe” mechanism to assure that the DMCA  
24 would be flexible enough to adapt to and account for any unreasonable restraints on fair use that  
25 might arise in practical application. Thus, the DMCA requires a triennial rulemaking review by  
26 the Copyright Office to consider the need for additional exemptions. 17 U.S.C. § 1201(a)(1).  
27 On October 27, 2002, the Copyright Office concluded its first review during which it specifically  
28 considered – **and rejected** – the suggestion that CSS encryption technology had an adverse

1 impact on the ability of users to make lawful uses of DVD motion pictures.<sup>5</sup> DMCA  
 2 Rulemaking, at 64567-70. It found the contrary to be true: "it appears clear from the evidence  
 3 that the *circumvention* of technological measures would be likely to have an adverse effect on  
 4 the availability of digital works on DVDs to the public." *Id.*, at 64570.

5 C. Section 1201 Does Not Violate the First Amendment

6 Although it is perhaps questionable whether true "speech" is implicated by 321's conduct  
 7 in trafficking in the DVD Circumvention Software, courts have held that "[c]omputer software is  
 8 expression that is protected by the copyright laws and is therefore 'speech' at some level, speech  
 9 that is protected at some level by the First Amendment." *Elcom*, 203 F.Supp.2d 1126. *See also*  
 10 *Corley*, 273 F.3d at 454. Accepting, arguendo, that the DVD Circumvention Software is  
 11 protectable speech, it is clear that the DMCA is content-neutral, furthers important governmental  
 12 interests, and is sufficiently tailored to further those interests.

13 1. **The DMCA Is Content-Neutral**

14 "[T]he scope of protection for speech generally depends on whether the restriction is  
 15 imposed because of the content of the speech." *Corley*, 273 F.3d at 450. "Content-based  
 16 restrictions are permissible only if they serve compelling state interests and do so by the least  
 17 restrictive means available." *Id.* (citing *Sable Communications of California, Inc. v. FCC*, 492  
 18 U.S. 115, 126 (1989)). "A content-neutral restriction is permissible if it serves a substantial  
 19 governmental interest, the interest is unrelated to the suppression of free expression, and the  
 20 regulation is narrowly tailored." *Id.* A law is narrowly-tailored when "the means chosen do not  
 21 'burden substantially more speech than is necessary to further the government's legitimate  
 22 interests.'" *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *Ward v.*  
 23 *Rock Against Racism*, 491 U.S. 781, 799 (1989)); *Corley*, 273 F.3d at 450.

24 Circumvention software is not pure speech. In its key respects, it is functional, thereby  
 25 necessitating an analysis that severs the software's expressive aspects from these functional

26  
 27 <sup>5</sup> The Copyright Office noted that "[m]ore comments and testimony were submitted on  
 28 the subject of motion pictures on digital versatile discs (DVDs) and the technological measures  
 employed on DVDs, primarily Content Scramble System ("CSS"), than on any other subject in  
 this rulemaking." DMCA Rulemaking at 64567.

elements. "When speech and non-speech elements are combined in a single course of conduct, a sufficiently important government interest in regulating the non-speech element can justify incidental intrusions on First Amendment freedoms." Elcom, 203 F. Supp. 2d at 1127-28 (citing United States v. O'Brien, 391 U.S. 367 (1968)); Junger v. Daley, 209 F.3d 481, 485 (6<sup>th</sup> Cir. 2000)). Because "computer code can instantly cause a computer to accomplish tasks and instantly render the results of those tasks available throughout the world via the Internet," and "[t]he only human action required to achieve these results can be as limited and instantaneous as a single click of a mouse," the "realities of what code is and what its normal functions are require a First Amendment analysis that treats code as combining nonspeech and speech elements, *i.e.*, functional and expressive elements." Corley, 273 F.3d at 451. Accordingly, "the capacity of a decryption program like DeCSS to accomplish unauthorized – indeed, unlawful – access to materials in which the Plaintiffs have intellectual property rights must inform and limit the scope of its First Amendment protection." Id. at 453.

Section 1201 prohibitions are aimed at the functional conduct of circumvention devices without regard to the viewpoint of the expression -- the "content" is irrelevant. "The principal inquiry in determining whether a statute is content-neutral is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." Elcom, 203 F. Supp. 2d at 1128 (citing Ward, 491 U.S. at 791). It is clear from the plain text of Section 1201, as well as from its legislative history, that Congress had no intention to regulate expressive content, but rather sought to protect copyrighted works in digital form from rapid and viral copying and distribution. 17 U.S.C. § 1201; see Reimerdes, 111 F.Supp.2d at 329 ("The reason that Congress enacted the anti-trafficking provision of the DMCA had nothing to do with suppressing particular ideas of computer programmers and everything to do with functionality."); Corley, 273 F.3d at 454.<sup>6</sup> As Congress did not enact the DMCA because of any agreement or disagreement with any particular message, the DMCA is content-neutral.

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<sup>6</sup> Because the DMCA does not, by its terms, regulate spoken words or expressive content, 321 cannot argue that the DMCA is facially overbroad. Elcom, 203 F.Supp at 1133 (rejecting challenge that DMCA was facially overbroad because it infringed alleged First

1 “Here, the parties have pointed to no portion of the legislative  
2 history that demonstrates a congressional intent to target speech  
3 because of its expressive content. Rather, Congress sought ways to  
4 further electronic commerce and protect intellectual property  
5 rights, while at the same time protecting fair use. In order to  
6 balance these priorities, Congress sought to ban trafficking in any  
7 technology or device that could be used to circumvent  
8 technological restrictions that served to protect the rights of  
9 copyright owners.” Elcom, 203 F.Supp.2d at 1128.

## 6 **2. The DMCA Promotes Substantial Governmental Interests And Is 7 Tailored To Further Those Interests**

8 Because the provisions of the DMCA are content-neutral, "intermediate" scrutiny applies  
9 to any First Amendment challenge. Elcom, 203 F.Supp.2d at 1129 ("the court concludes that  
10 intermediate scrutiny, rather than strict scrutiny, is the appropriate standard to apply."); Corley,  
11 273 F.3d at 454 ("[Section 1201] is. . . content-neutral, just as would be a restriction on  
12 trafficking in skeleton keys, identified because of their capacity to unlock jail cells"). Under  
13 "intermediate" scrutiny, a regulation:

14 “will be sustained if it furthers an important or substantial  
15 governmental interest; if the governmental interest is unrelated to  
16 the suppression of free expression; and if the incidental restriction  
17 on alleged First Amendment freedoms is no greater than is  
18 essential to the furtherance of that interest. To satisfy this standard,  
19 a regulation need not be the least speech-restrictive means of  
20 advancing the Government's interests. Rather, the requirement of  
21 narrow tailoring is satisfied so long as the regulation promotes a  
22 substantial governmental interest that would be achieved less  
23 effectively absent the regulation.” Turner, 512 U.S. at 680  
24 (quoting O'Brien, 391 U.S. at 377; Ward, 491 U.S. at 799, internal  
25 quotations omitted).

26 "The Government's interest in preventing unauthorized access to encrypted copyrighted  
27 material is unquestionably substantial, and the regulation of DeCSS . . . plainly serves that  
28 interest." Corley, 273 F.3d at 454. Congress had at least two important governmental interests  
in enacting the DMCA: (1) preventing the unauthorized access, copying, and distribution of

Amendment rights of third parties: "facial attacks on overbreadth grounds are limited to  
situations in which the statute or regulation by its terms regulates spoken words or expressive  
conduct.")

1 copyrighted works, and (2) promoting the development of electronic commerce. See H. Rep.  
 2 No. 105-551 (II) , at 23 (1998) ("The debate on this legislation highlighted two important  
 3 priorities: promoting the continued growth and development of electronic commerce; and  
 4 protecting intellectual property rights"); S. Rep. No. 105-190, at 8 (1998) ("Due to the ease with  
 5 which digital works can be copied and distributed worldwide virtually instantaneously, copyright  
 6 owners will hesitate to make their works readily available on the Internet without reasonable  
 7 assurance that they will be protected against massive piracy"). "These governmental interests  
 8 are both legitimate and substantial." Elcom, 203 F.Supp.2d at 1130.

9 Section 1201 is tailored to achieve these important governmental interests: "Without the  
 10 ban on trafficking in circumvention tools, the government's interest in promoting electronic  
 11 commerce, preserving the rights of copyright holders, and preventing piracy would be  
 12 undermined. The absence of effective technological restrictions to prevent copyright  
 13 infringement would inevitably result in even more rampant piracy, with a corresponding likely  
 14 decrease in the willingness of authors and owners of copyrighted works to produce them in  
 15 digital form or make the works available on-line." Id. "[T]he DMCA does not burden  
 16 substantially more speech than is necessary to achieve the government's asserted goals of  
 17 promoting electronic commerce, protecting copyrights, and preventing electronic piracy." Id. at  
 18 1132 (citing O'Brien, 391 U.S. at 367); Corley, 273 F.3d at 454-55 (prohibition on dissemination  
 19 of DeCSS does not burden more speech than necessary).

#### 20 D. Section 1201 Is Not Unconstitutionally Vague

21 The mandate of section 1201 could not be clearer: trafficking in technology primarily  
 22 designed to circumvent access or copying protection is unlawful. Liability under section 1201  
 23 does not require knowledge of the uses an alleged trafficker's customers might make of the  
 24 technology, and liability does not turn on whether those customers intend or actually do make  
 25 "fair" or socially acceptable uses. Section 1201 expressly prohibits *all* trafficking in anti-  
 26 circumvention devices. Elcom, 203 F.Supp. 2d at 1124.

27 The specific language of section 1201 also is clear. In Elcom, the Court considered and  
 28 upheld the "primarily designed" and "marketed for use" phrases in section 1201, 203 F.Supp.2d

at 1137 ("the primarily designed for' and 'marketed for use' language is not unconstitutionally vague"), and courts repeatedly have upheld this language in other statutes. See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 500-03 (1982) ("designed for" and "marketed primarily for use" drug law was not unconstitutionally vague); Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994) ("primarily intended ... for use" drug law was not unconstitutionally vague); Richmond Boro Gun Club, Inc. v. City of New York, 97 F.3d 681, 685-86 (2d Cir. 1996) ("designed for" gun law was not unconstitutionally vague).

In fact, all of the operative language of Section 1201 is specifically defined. 17 U.S.C. §§ 1201 (a)(3) (defining "circumvent a technological measure," and "effectively controls access to a work"); 1201 (b)(2) (defining "circumvent protection afforded by a technological measure," and "effectively protects a right of a copyright owner under this title"). Taken together, these definitions ensure that "the DMCA's prohibition on trafficking in technologies that circumvent use and copy restrictions is sufficiently clear to withstand a vagueness attack." Elcom, 203 F.Supp.2d at 1137 (referring to the Section 106 and 107 definitions as well as those contained in Section 1201 in rejecting a void-for-vagueness argument).

# **VI. 321 SHOULD BE ENJOINED FROM MANUFACTURING, DISTRIBUTING, OR OTHERWISE TRAFFICKING IN THE DVD CIRCUMVENTION SOFTWARE**

Section 1203(b) provides: "In an action brought under [the DMCA], the court. . . may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation." In Reimerdes, the Court held that "injunctive relief is appropriate if there is a reasonable likelihood of future violations absent such relief," and the plaintiffs lack an adequate remedy at law. 111 F.Supp.2d at 343. Both elements are present here. 321 continues to traffic in the DVD Circumvention Software, notwithstanding (1) the plain language of the statute prohibits the circumvention of technological protection measures; (2) 321's knowledge that the Second Circuit already has found liability for circumventing CSS protection; and (3) every court that has considered 321's constitutional challenges has rejected them. 321's attitude was voiced by its president: "[w]hether we knew or didn't know we were breaking the law was irrelevant." Mayer Decl., Ex. D. And, an injunction is necessary because the Studios have no



adequate remedy at law. The further dissemination of the DVD Circumvention Software would have far-reaching, serious consequences for the ongoing viability of the DVD medium.

“Copyright and, more broadly, intellectual property piracy are endemic, as Congress repeatedly has found. The interest served by prohibiting means that facilitate such piracy – the protection of the monopoly granted to copyright owners by the Copyright Act – is of constitutional dimension. There is little room for doubting that broad dissemination of DeCSS would seriously injure or destroy plaintiffs' ability to distribute their copyrighted products on DVDs and, for that matter, undermine their ability to sell their products to the ‘home video’ market in other forms. The potential damages probably are incalculable....” Reimerdes, 82 F. Supp. 2d at 225-26.

See also, DMCA Rulemaking at 64570 (“it appears clear from the evidence that the circumvention of technological protection measures would be likely to have an adverse effect on the availability of digital works on DVDs to the public.”).

### CONCLUSION

Each of the three courts that has ruled on the DMCA's anti-circumvention provisions has considered the very issues that 321 asserts here. Each time, the court upheld the constitutionality of the DMCA, in thoughtful opinions, whose reasoning, we submit, is equally persuasive here. 321's admitted conduct (and the results of its conduct) are no different from that of the other traffickers whose challenges to the DMCA were rejected. Because there are no material issues of fact, the Studios respectfully request that the Court grant the motion for partial summary judgment and issue the requested injunction, and dismiss as moot 321's Second Claim for Declaratory Relief.

DATED: January 10, 2003

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